UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

M.B. by his next friend Ericka Eggemeyer; E.S. and Z.S. by their next friend, Nina Schunck; K.C. by her next friend Kris Dadant; A.H. by her next friend, Grey Endres, for themselves and those similarly situated, Plaintiffs, v. Jennifer Tidball, in her official capacity as Interim Director of the Missouri Department of Social Services; Tim Decker, in his official capacity as Director of the Children's Division of the Missouri Department of Social Services, Defendants.	)	No. 2:17-cv-4102-NKL

PLAINTIFFS' MOTION TO PROCEED WITH THE USE OF PSEUDONYMS AND SUGGESTIONS IN SUPPORT

Come now Plaintiffs and move this Court for permission to proceed using pseudonymous initials for the Plaintiff Children. In support, Plaintiffs state as follows:

1. The Plaintiff Children are minors who are in foster care in the State of Missouri. Through their adult Next Friends, they seek declaratory and injunctive relief to abate the substantial risk of harm they face from Defendants' failure to maintain an adequate oversight system to ensure that psychotropic medications are administered safely to foster children and only when appropriate.

2. The Plaintiff Children have a recognized interest in maintaining their privacy based on their status as children in the foster care system with serious mental health needs. The Plaintiff Children seek to use pseudonyms to avoid the negative consequences the public may attribute to being in foster care and to requiring psychological and psychiatric care.

3. The Court has the discretion to allow the Plaintiff Children to sue using a pseudonym. *Doe v. United States*, 210 F. Supp. 3d 1169, 1172 (W.D. Mo. 2016) (quoting *In re Ashley Madison Customer Data Security Breach Litig.*, 2016 U.S. Dist. LEXIS 46893, at *10 (E.D. Mo. Apr. 6, 2016)); *see also Doe v. Lincoln Unified Sch. Dist.*, 115 Cal. Rptr. 3d 191, 197 (Cal. Ct. App. 2010) (noting that "United States Supreme Court has also implicitly endorsed the use of pseudonyms to protect a plaintiff's privacy") (collecting cases). Federal courts generally use a totality-of-the-circumstances balancing test when deciding whether a party can sue under a pseudonym. *Doe v. United States*, 210 F. Supp. 3d at 1173 (quoting *Ashley Madison*, 2016 U.S. Dist. LEXIS 46893, at *11). Under that test, the court looks to "whether a plaintiff has a substantial privacy right which outweighs the customary constitutionally-embedded presumption of openness in judicial proceedings." *Id.*

4. Courts have identified several common features in cases in which plaintiffs have been "permitted to proceed under a fictitious name, including (1) where the plaintiff is challenging government activity; (2) where the plaintiff is required to disclose information of the utmost intimacy, and (3) where the plaintiff risks criminal prosecution through the information contained in the pleading." *Id.* (quoting *Ashley Madison*, 2016 U.S. Dist. LEXIS 46893, at *10); *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 189-90 (2d Cir. 2008) (identifying several additional factors and noting that "this list is non-exhaustive and district courts should take into account other factors relevant to the particular case under consideration"). Courts allow the use of pseudonyms where "anonymity is necessary 'to preserve privacy in a matter of sensitive and highly personal nature,'" *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (quoting *James v. Jacobsen*, 6 F.3d 233, 239 (4th Cir. 1993)), or "there is some social

stigma" that would attach due to public disclosure of the plaintiffs' identities, *Ashley Madison*, 2016 US Dist. LEXIS 46893, at *12-13.

5. First, the Plaintiff Children's identities should be protected because their case concerns a matter of sensitive and highly personal nature. Plaintiff Children's lawsuit addresses their private mental and physical health information and treatment. Courts have recognized a constitutionally protected interest in avoiding disclosure of personal matters, including medical information. *Doe v. Beard*, 63 F. Supp. 3d 1159, 1166 n.4 (C.D. Cal. 2014) (collecting cases). In particular, this case involves specifics of how the Plaintiff Children were treated for mental health disorders, information that is very private and public disclosure of which could be stigmatizing and traumatizing for them. *See Vitek v. Jones*, 445 U.S. 480, 492 (1980) (noting that compelled psychiatric treatment "can engender adverse social consequences to the individual" that can "have a very significant impact on the individual") (citation omitted).

6. Second, the Plaintiff Children should be allowed to prosecute this case through pseudonyms because the case involves details of their private history as foster children and their involvement in the state's child welfare system. Missouri state law recognizes that such information should be kept confidential. *See, e.g.*, Mo. Rev. Stat. § 210.566.2(7) ("Foster parents shall treat all information received from the children's division and its contractors about the child and the child's family as confidential."); Mo. Rev. Stat. § 210.150 (requiring that the Children's Division "ensure the confidentiality" of abuse and neglect records).

7. Third, the identities of the Plaintiff Children should be protected because they are minors and the sensitive subject matter at issue – including their private health information and child welfare system involvement – is based exclusively on their experiences as minors. Courts consider the age of a plaintiff to be a "significant factor in the matrix of considerations arguing

for anonymity" based on a recognition of the "special vulnerability" of minors. *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981); *see also Sealed Plaintiff*, 537 F.3d at 190 (stating that an important factor in the balancing inquiry is "whether the plaintiff is particularly vulnerable to the possible harms of disclosure, particularly in light of his age") (internal citations omitted).

8. The fact that the instant case is brought against the government also weighs in favor of permitting the Plaintiff Children to prosecute this case using pseudonyms. *See, e.g.*, *Doe v. United States*, 210 F. Supp. 3d at 1173 (finding this factor favors permitting use of pseudonyms). Courts have observed that it is more appropriate to allow plaintiffs to proceed anonymously when they are "challenging the constitutional, statutory or regulatory validity of government activity." *Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) (explaining that, unlike suits against private entities which may injure their reputation, suits challenging the validity of government action "involve no injury to the Government's 'reputation'").

9. The use of pseudonyms is the least restrictive method of ensuring the Plaintiff Children's privacy. Although Federal Rule of Civil Procedure 5.2(a)(3) entitles the Plaintiff Children, as minors, to use their initials rather than their full names, that protection is not sufficient to protect their privacy, as knowledgeable individuals would still be able to identify them with that information. Accordingly, Plaintiff Children seek permission to use pseudonymous initials instead.

10. Allowing the Plaintiff Children to use pseudonymous initials in publicly-filed documents would cause no prejudice to Defendants. Upon entry of a protective order, Plaintiff Children's counsel will work with Defendants' counsel to ensure that the Plaintiff Children's identities are known to Defendants' counsel. *Cf. Doe v. United States*, 210 F. Supp. 3d at 1173

(finding no prejudice to the government in allowing plaintiffs to use pseudonyms where it can learn the plaintiffs' identities through other means). All that the Plaintiff Children seek in this motion is permission to use pseudonyms in the publicly filed documents in this case. "Courts generally find little to no risk of unfairness to an accused defendant … where discovery does not appear to be inhibited by the plaintiff's desire to proceed anonymously." *Doe v. Cabrera*, 307 F.R.D. 1, 8 (D.D.C. 2014); *Doe No. 2 v. Kolko*, 242 F.R.D. 193, 198 (E.D.N.Y. 2006).

Wherefore, Plaintiffs pray for an Order of the Court as follows:

A. Granting them leave to proceed in this matter with the use of pseudonymous initials for the Plaintiff Children;

B. Ordering that Defendants will not publicly disclose the names or personal identifying information of the Plaintiff Children after Defendants learn their names and personal identifying information; and

C. Ordering that all parties shall submit pleadings, briefing and evidence using the Plaintiff Children's pseudonymous initials instead of their real initials and other personally identifying information.[1]

DATED: June 12, 2017

Respectfully Submitted,

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[1] Plaintiffs will seek a more comprehensive protective order.

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